

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

HORIZON/CMS HEALTHCARE CORPORATION
and HEALTHSOUTH CORPORATION,

Plaintiffs,

vs.

No. CV 99-966 JP/LFG

AMERICAN CONTINENTAL INSURANCE
COMPANY and MARC A. BERNSTEIN, ESQ.,

Defendants.

MEMORANDUM OPINION

The Court's Memorandum Opinion and Order of May 2, 2000 addressed, among other matters, Defendant Bernstein's motion to dismiss the two claims for relief asserted against him in the Second Amended Complaint. In that opinion I ruled that the Sixth Claim For Relief (for damages) should be dismissed, and that the Seventh Claim For Relief (for injunctive relief) would be dismissed unless Plaintiffs demonstrated their right to injunctive relief by the filing of a More Definite Statement. The more definite statement was to give Plaintiffs another opportunity to specify the general nature of the confidential information allegedly possessed by Defendant Bernstein and how revealing that information could cause irreparable harm to Plaintiffs with respect to the issue of insurance coverage for punitive damages in the underlying actions.

On May 15, 2000 Plaintiffs Horizon/CMS Healthcare Corporation and

HealthSouth Corporation (“Horizon and HealthSouth”) filed a More Definite Statement. After carefully considering the contents of the More Definite Statement, the exhibits filed under seal with it, and the remainder of the pleadings, I conclude that the Seventh Claim For Relief should be dismissed.

The dispute between Plaintiffs and Defendant American Continental Insurance Company (“ACIC”) concerns the existence of insurance coverage for punitive damage awards in personal injury actions filed against Plaintiffs in various states. Plaintiffs operate healthcare facilities in several states, and ACIC insures Plaintiffs for certain liabilities arising out of the operation of the facilities. ACIC is providing a defense to Plaintiffs in the underlying lawsuits. The claimants in those cases have accused Plaintiffs of acts of gross corporate negligence or other conduct which, if proven, could give rise to awards of punitive damages. ACIC has informed Plaintiffs that it may not provide coverage for punitive damages in the personal injury lawsuits.

The dispute between Plaintiffs and Defendant Marc A. Bernstein, Esq. (“Bernstein”), a New Mexico attorney, concerns the alleged breach by Bernstein of his fiduciary duty to Horizon, his former employer, for which Plaintiffs sought damages (in the since-dismissed Sixth Claim For Relief) and injunctive relief (in the Seventh Claim For Relief). I dismissed the claim for damages because of inadequate allegations of the elements of causation and damages. At the same time I announced my skepticism of the viability of the claim for injunctive relief, but allowed Plaintiffs to file the more definite statement.

In their More Definite Statement, Plaintiffs assert that Bernstein received confidential information of a factual nature while acting as an attorney in Horizon's risk management department. This information came from employees of Horizon, experts hired by Bernstein on behalf of Horizon, and counsel appointed to represent Horizon's interests. The information concerns the business strategy, legal strategy and litigation strategy involved in Horizon's efforts to secure insurance coverage for the underlying personal injury claims, including coverage for punitive damages.

Bernstein was involved in assessing Horizon's potential liability in the personal injury actions by soliciting confidential factual information about the conduct of its healthcare facility employees. This included hiring and working with experts to review the care provided at the facilities. Bernstein gained knowledge of witnesses' conduct and their potential testimony, specific litigation strategies, confidential internal investigations and reports, and other confidential business information. Some of this information came from defense counsel in the underlying lawsuits who freely discussed the strengths and weaknesses of certain facilities.

In short, Bernstein knows all the bad facts about the facilities operated by Horizon and HealthSouth that might give rise to an award of punitive damages in the underlying cases. He also is privy to Horizon's strategies to try to ensure insurance coverage in spite of these facts.

Plaintiffs contend that Bernstein is in a position to use this confidential information to harm Plaintiffs while he is involved in communicating insurance coverage

positions to Plaintiffs on behalf of ACIC, investigating underlying claims, and communicating with ACIC claims personnel. They also contend that ACIC will use factual information about practices at the healthcare facilities to deny insurance coverage under several theories. One of these is known as the “expected or intended” defense, under which coverage might be denied if the conduct at the facilities was of such a malicious nature as to be expected or intentional. Another theory involves a policy endorsement excluding coverage for “fraudulent or malicious acts” or for acts in violation of law. Finally, ACIC contends that punitive damages are not covered because of the operation of Texas statutes and public policy.

I assume that all the factual assertions in the More Definite Statement are true. However, evidence that Bernstein is in imminent danger of revealing Horizon’s confidential factual information to ACIC in a way it could harm Horizon and/or HealthSouth in the insurance coverage dispute consists only of: (1) Bernstein wrote letters to Horizon and HealthSouth informing them that certain factual allegations made in the underlying claims could, if proven, either limit or preclude insurance coverage under the ACIC policies; and (2) he appeared at a mediation in the *Fuqua* case even after ACIC had agreed he would not work on the insurance coverage issues.

I must engage in a realistic appraisal of the danger that Bernstein’s knowledge of confidential information about Horizon will give rise to an actual and imminent risk of irreparable harm to Plaintiffs if disclosed to ACIC. Nothing in Plaintiffs’ More Definite Statement convinces me that Plaintiffs have adequately stated a bona fide claim for

injunctive relief against Defendant Bernstein. Plaintiffs have not responded to several concerns expressed in my previous opinion: that Plaintiffs do not seek temporary or preliminary injunctive relief; that ACIC has already agreed that Bernstein will not work on the only matter on which Plaintiffs and ACIC are adverse, the insurance coverage issues; that ACIC's coverage position is not alleged to have resulted from Bernstein's knowledge of his former client's confidential or privileged information; and that Plaintiffs waited nearly a year and a half after Bernstein's employment with ACIC before seeking injunctive relief.

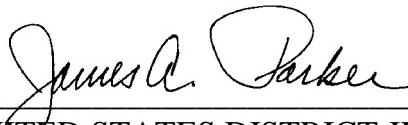
There would be no logical reason to enjoin Bernstein from working on the underlying personal injury actions in which Plaintiffs and ACIC share the same interests. In those cases both Plaintiffs and ACIC seek to avoid Plaintiffs' liability for damages of any kind, either compensatory or punitive.

ACIC's asserted coverage defenses are based upon allegations in the complaints in the underlying personal injury actions, not on any confidential information possessed by Defendant Bernstein. It is the plaintiffs in those actions who will be attempting to prove malice and other wrongdoing that might give rise to punitive damages against Horizon and HealthSouth. Even if Bernstein possesses confidential knowledge about wrongdoing by Horizon and HealthSouth, and even assuming the attorneys for plaintiffs in the underlying personal injury actions might somehow fail to become aware of such information after conducting discovery, it is not logical to assume Bernstein would be motivated to disclose that information to ACIC, or to assume that ACIC could use such

information to its benefit. Such information could only benefit the personal injury plaintiffs, and Bernstein has not “switched” to their “side.” Put another way, the insurance company cannot be shielded from knowledge of bad conduct at the facilities it insures. It cannot use that information against Horizon and/or HealthSouth to deny coverage unless it is proven by the personal injury plaintiffs. Therefore the insurance company and its insureds are not “adverse” in the same way that other parties are adverse. Rather, they share many common interests *vis a vis* the underlying actions.

I conclude that Plaintiffs’ allegations of irreparable harm, both in the Second Amended Complaint and in the More Definite Statement, are inadequate to state a claim for injunctive relief against Defendant Bernstein.

IT IS THEREFORE ORDERED that Defendant Marc A. Bernstein’s Motion to Dismiss is hereby GRANTED, and that the Seventh Claim For Relief will be dismissed.



UNITED STATES DISTRICT JUDGE

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